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4 UNITED STATES DISTRICT COURT
5 WESTERN DISTRICT OF WASHINGTON
6 AT TACOMA

7 UNITED STATES OF AMERICA,

8 Plaintiff,

9 v.

10 MATHEW G. RAY, et al.,

11 Defendants.

CASE NO. C11-5056 BHS

ORDER GRANTING
DEFENDANTS' MOTION TO
STAY THE PROCEEDINGS

13 This matter comes before the Court on Defendants' motion to dismiss this action
14 or in the alternative, to abstain from entertaining it or to stay further proceedings (Dkt. 9),
15 and on the United States' cross-motion to dismiss Defendants' counterclaims (Dkt. 12).
16 The Court has reviewed the briefs filed in support of and in opposition to the motion to
17 stay the proceedings and declines to rule on other issues raised by the pleadings for the
18 reasons stated herein.

19 **I. PROCEDURAL HISTORY**

20 On January 20, 2011, the United States filed a complaint against Defendants for
21 trespass, waste, conversion and nuisance. Dkt. 1. On March 1, 2011, Defendants
22 answered and filed counterclaims against the United States. Dkt. 7. On April 2, 2011,
23 Defendants moved the Court to dismiss this action or in the alternative, to abstain from
24 entertaining it or to stay further proceedings. Dkts. 9 & 10. On April 25, 2011, the United
25 States opposed the motion and filed a cross-motion to dismiss Defendants' counterclaims.
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1 On April 26, 2011, Defendants replied to the United States' opposition, but they did not
2 respond to the United States' cross-motion. Dkt. 15.

3 **II. FACTUAL BACKGROUND**

4 This matter involves allegations for trespass, waste, conversion and nuisance on
5 Allotment 108-294 ("allotment") of the Makah Indian Reservation. Dkt. 12 at 2-3. The
6 allotment is co-owned by Jesse A. Chartraw, Dennis G. Leonard, Betty Croy, and JoDean
7 Haupt (collectively, "Co-owners"). Dkt. 1 at 2 ¶ 2. This action was brought by the United
8 States, acting on its own and as trustee on behalf of the Makah Nation, at the request of
9 the Bureau of Indian Affairs ("BIA") and the allotment Co-owners. *Id.* The allotment Co-
10 owners and Defendants are all members of the Makah Nation. Dkts. 1 at 2 ¶¶ 7-8 & 10 at

11 1. The United States alleges that, on or about September 22, 2007, without the
12 consent of the Co-owners, Defendants demolished the home and porches affixed to the
13 allotment and caused other unspecified damages to the property and/or its fixtures. Dkts.
14 1 at 2 ¶ 3 & 12 at 3. Defendants maintain that Defendant Mathew G. Ray owned the home
15 at issue. Dkt. 7 at 1-3.

16 In May 2008, the BIA found that Defendants had trespassed and destroyed
17 property on the allotment and assessed each of the Defendants treble damages in trespass
18 demand notice letters. Dkts. 1 at 8 ¶ 39; 12 at 4 & 13-2. The United States alleges that,
19 with the exception of a requested extension by Mathew Ray, Defendants did not respond
20 to the trespass demand notice letters. Dkt. 12 at 4. Defendants maintain that "each of the
21 defendants timely filed a notice of appeal." Dkt. 10 at 9.

22 **III. DISCUSSION**

23 **A. Comity and Exhaustion of Tribal Remedies**

24 **1. Standard**

25 The Supreme Court requires that tribal courts consider the issue of their own
26 jurisdiction first, with federal court actions to be dismissed or stayed pending exhaustion
27 of tribal remedies. *See, e.g.,* *United States v. Shoshone-Bannock Tribe*, 522 U.S. 107, 113
28 (1997).

1 of tribal court remedies. *National Farmers Union Ins. Cos. v. Crow Tribe of Indians*, 471
2 U.S. 845, 856-57 (1985). This exhaustion requirement advances the principles of tribal
3 self-governance and self-determination and prevents infringement upon tribal
4 law-making authority. *See Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9, 14-15 (1987). In
5 the Ninth Circuit the exhaustion of tribal remedies is not discretionary; it is mandatory.
6 *See Yellowstone County v. Pease*, 96 F. 3d 1169, 1171 (9th Cir. 1996).

7 The Supreme Court has outlined four exceptions to the exhaustion rule: (1) when
8 an assertion of tribal court jurisdiction is “motivated by a desire to harass or is conducted
9 in bad faith”; (2) when the tribal court action is “patently violative of express
10 jurisdictional prohibitions”; (3) when “exhaustion would be futile because of the lack of
11 an adequate opportunity to challenge the [tribal] court’s jurisdiction”; and (4) when it is
12 “plain” that tribal court jurisdiction is lacking, so that the exhaustion requirement “would
13 serve no purpose other than delay.” *Nevada v. Hicks*, 533 U.S. 353, 369 (2001) (quoting
14 *National Farmers*, 471 U.S. at 857, n. 21 (1985) (internal quotation marks omitted)).

16 Although a federal court may not exercise jurisdiction over a civil dispute relating
17 to reservation affairs before an appropriate Indian tribal court system has first had an
18 opportunity to determine its own jurisdiction, exhaustion is required as a matter of comity
19 and is not a jurisdictional prerequisite. *Iowa Mut.*, 480 U.S. at 16, n. 8. Therefore, the
20 exhaustion requirement does not deprive the federal courts of subject matter jurisdiction.
21 *Id.*; *National Farmers*, 471 U.S. at 857. The tribal court’s determination of tribal
22 jurisdiction is ultimately subject to review. *Iowa Mut.*, 480 U.S. at 19; *see also National*
23 *Farmers*, 471 U.S. at 857.

24 **2. Defendants’ Motion to Dismiss or Stay Proceedings**

25 Defendants move the Court to dismiss this case, or in the alternative, to abstain
26 from entertaining it or to stay the proceedings “as a matter of [c]omity until tribal court
27 remedies are exhausted.” Dkt. 15 at 2. The United States argues that this suit is exempt
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1 from considerations of comity. Dkt. 12 at 5. Specifically, the United States argues that
2 bringing this suit in tribal court “would be patently violative of the Makah Nation’s
3 express jurisdictional prohibitions” because the Makah Nation’s statute of limitations bars
4 this cause of action. *Id.* Defendants contend that because statutes of limitation can be
5 tolled for various reasons, it is for the tribal court to “make its own determination as to
6 whether such an action is barred” (Dkt. 15 at 4) and to consider whether it “possesses
7 jurisdiction over the cause in the first instance.” *Id.*

8 Here, in support of its argument, the United States points to the Makah Nation’s
9 code which states that “No complaint shall be filed in a civil action unless the events shall
10 have occurred within a 3 year period prior to the date of the complaint.” *Makah Law and*
11 *Order Code* § 3.2.02 (1999) (available at: <http://narf.org/nill/Codes/makahcode/makahcodetoc.htm>). Dkt. 12 at 5. However, the Court notes that while the statute of
12 limitations are arguably expressly stated within the code, this is not the end of the inquiry.
13 Cf. *National Farmers*, 471 U.S. at 855–856 (footnote omitted). The Court is persuaded by
14 Defendants’ argument that tribal tolling provisions may be available at law or in equity
15 but which are not for this Court to determine in the first instance. See Dkt. 15 at 6.

16 The propriety of tolling the statute of limitations under Makah law, and in
17 accordance with its own judicial decisions, is a question for the Makah Tribal Court to
18 examine. In the absence of the Makah Tribal Court’s determination on jurisdiction in
19 these circumstances, this Court cannot conclude that suit in tribal court would be violative
20 of any jurisdictional prohibition. Thus, the United States’ argument that it is exempt from
21 exhausting tribal remedies necessarily fails.

22 Without a qualifying exception to the exhaustion requirement, the principles of
23 comity and tribal self governance require that the Court abstain from entertaining the
24 United States’ complaint until the Makah Tribal Court has the opportunity to evaluate the
25 factual and legal bases for determining whether or not the statute of limitations bars the
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1 Tribal Court's jurisdiction. *See National Farmers*, 471 U.S. at 856. Should the Makah
2 Tribal Court agree with the United States or decline jurisdiction on other grounds, the
3 exhaustion rule would be satisfied and this Court will then become the proper forum for
4 this matter. *See, Iowa Mut.*, 480 U.S. at 16, n. 8; *National Farmers*, 471 U.S. at 857.
5 Therefore, pending the Makah Tribal Court's jurisdictional analysis, the Court will stay
6 further proceedings.

7 **B. Other Issues**

8 Likewise, because the Court declines to exercise jurisdiction pending the
9 exhaustion of Makah Tribal Court remedies, the Court declines to reach the other issues
10 raised in the parties' briefs. This includes the United States' motion to dismiss
11 Defendants' counterclaims. Dkt. 12.

12 **IV. ORDER**

13 Therefore, it is hereby **ORDERED** that:

- 14 (1) Defendants' motion to stay the proceedings (Dkt. 9) is **GRANTED**; and
15 (2) Further proceedings on this matter are **STAYED** pending exhaustion of
16 tribal court remedies.

17 DATED this 21st day of June, 2011.

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BENJAMIN H. SETTLE
United States District Judge